

MT LEGISLATIVE HISTORY

Chapter 416 1977

Bill (H) 664 S _____

Original bill & hist. C

H. Committee on Judiciary Water Subcommittee

S. Committee on Agriculture, Livestock +

Hearing Date(s) FEB 17 ✓ C

Hearing Date(s) MAR 11 ✓ C Irrigation

FEB 23 ✓ C

MAR 16 ✓ C

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_____ C

Date Out Feb 23 ✓ C

Mar 16 ✓ C

Did this bill originate in an interim committee? Yes No

Committee _____

Report _____

COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION

HOUSE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO <u>DATE</u>	DO NOT PASS <u>DATE</u>	DO PASS AS AMEND. <u>DATE</u>	BE CON- CURRED IN <u>DATE</u>	BE CONC. IN AS AMENDED <u>DATE</u>	BE NOT CON- CURRED IN <u>DATE</u>
HB 452	2-4-77	2/14	2/14				2/14		
HB 478	3-3-77	3/7	let die						
HB 484	2-15-77	2/21	2/21	WITHOUT RECOMMENDATION					
HB 495	3-3-77	3/21	3/21				3/21		
HB 509	2-23-77	2/24	2/23	TABLED					
HB 526	2-23-77	3/14	3/14					3/14	
HB 535	2-22-77	3/7	3/7					3/7	
HB 560	4-1-77	4/4	4/4					4/4	
HB 664	3-5-77	3/11/16	3/16				3/16		
HB 669	2-25-77	3/16	3/16				3/16		
HB 809	2-26-77	3/7/23	3/23	TABLED	(subcommittee minutes attached this date)				
HB 810	3-5-77	3/7	3/7					3/7	

(Use Separate Sheet for Senate, House Bills, and Resolutions)

1 *House* BILL NO. *664*
 2 INTRODUCED BY *Ray By Request MMT water Subcommittee*
 3 BY REQUEST OF
 4 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
 5
 6 A BILL FOR AN ACT ENTITLED: "AN ACT TO AMEND SECTIONS
 7 89-867, 89-875, 89-880, 89-884, 89-885, 89-890, 89-892, AND
 8 89-8-100, R.C.M. 1947, OF THE MONTANA WATER USE ACT TO
 9 CLARIFY DEFINITIONS; TO REDUCE THE COST OF SERVING COPIES OF
 10 PRELIMINARY DECREES; TO PROVIDE FOR THE PRIORITY DATE OF
 11 CERTAIN REFILED APPLICATIONS; TO TERMINATE CERTAIN
 12 UNCORRECTED APPLICATIONS; TO CLARIFY THE REFILEING OF NOTICES
 13 OF COMPLETION OF SMALL WELLS; TO PROVIDE FOR THE EXTENSION
 14 OF TIME TO ACT UPON APPLICATIONS IN EXTRAORDINARY CASES; TO
 15 PROVIDE THAT AN APPLICANT FOR AN APPROPRIATION OF 10,000
 16 ACRE-FEET A YEAR OR MORE MUST PROVE BY CLEAR AND CONVINCING
 17 EVIDENCE THAT THE RIGHTS OF A PRIOR APPROPRIATOR WILL NOT BE
 18 ADVERSELY AFFECTED; TO CLARIFY THE PERIODIC REVIEW BY THE
 19 BOARD OF RESERVATIONS OF WATER; TO PROVIDE THAT THE
 20 DEPARTMENT MAY APPROVE CHANGES IN APPROPRIATION RIGHTS WITH
 21 CONDITIONS TO PROTECT OTHER APPROPRIATORS; AND TO ELIMINATE
 22 THE RIGHT TO APPEAL A FINAL DECISION OF THE DEPARTMENT TO
 23 THE BOARD."
 24
 25 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

INTRODUCED BILL

1 Section 1. Section 89-867, R.C.M. 1947, is amended to
 2 read as follows:
 3 "89-867. Definitions. Unless the context requires
 4 otherwise, in this chapter:
 5 (1) "Water" means all water of the state, surface and
 6 subsurface, regardless of its character or manner of
 7 occurrence, including geothermal water and diffuse surface
 8 water.
 9 (2) "Beneficial use" means a use of water for the
 10 benefit of the appropriator, other persons, or the public,
 11 including, but not limited to, agricultural (including stock
 12 water), domestic, fish and wildlife, industrial, irrigation,
 13 mining, municipal, power, and recreational uses; provided,
 14 however, that a use of water for slurry to export coal from
 15 Montana is not a beneficial use. Slurry is a mixture of
 16 water and insoluble matter.
 17 (3) "Appropriate" means to divert, impound, or
 18 withdraw (including by stock for stock water) a quantity of
 19 water, or in the case of a public agency to reserve water in
 20 accordance with section 89-890.
 21 (4) "Existing right" means a right to the use of water
 22 which would be protected under the law as it existed prior
 23 to July 1, 1973.
 24 (5) "Groundwater" means any water beneath the land
 25 surface or beneath the bed of a stream, lake, reservoir, or

HB664

other body of surface water, and which is not a part of that surface water.

(6) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or through which it flows under natural pressures or is artificially withdrawn.

(7) "Permit" means the permit to appropriate issued by the department under sections 89-880 through 89-887.

(8) "Certificate" means the certificate of water right issued by the department under sections 89-879, 89-880(5), and 89-888.

(9) "Declaration" means the declaration of an existing right filed with the department under section 89-872.

(10) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility, or the application of water to anything but a beneficial use.

(11) ~~"Political subdivision"~~ "Political subdivision" means any county, incorporated city or town, public corporation or district created pursuant to state law, or other public body of the state empowered to appropriate water, but not a private corporation, association, or group.

(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, and the United States or any agency thereof, or

any other entity.

(13) "Department" means the department of natural resources and conservation provided for in Title 82A, chapter 15.

(14) "Board" means the board of natural resources and conservation provided for in section 82A-1509.

(15) "Act" means the Montana Water Use Act and any subsequent amendments or additions thereto."

Section 2. Section 89-875, R.C.M. 1947, is amended to read as follows:

"89-875. Preliminary decree. (1) Within a reasonable time after the department files with the district court the material required by section 89-874, the court shall issue a preliminary decree. The preliminary decree shall be based on the data submitted by the department and on any additional data obtained by the court.

(2) The preliminary decree shall contain the information, and make the determinations, findings, and conclusions, required for the final decree under section 89-877.

(3) The district court shall send a copy of the preliminary decree ~~by certified mail with return receipt requested~~ to the department, and the department shall serve by mail or by personal service a copy of the preliminary decree to each person named in the material submitted under

1 section 89-874 or named in the preliminary decree. The
 2 ~~return receipt shall be appended to the preliminary decree.~~
 3 ~~The costs of mailing the copies shall be paid by the~~
 4 ~~department. The department shall file proof of service with~~
 5 the district court.

6 (4) A person named in the material or in the
 7 preliminary decree may inspect the data upon which the
 8 decree is based at any time, and he may purchase copies of
 9 any of the data."

10 Section 3. Section 89-880, R.C.M. 1947, is amended to
 11 read as follows:

12 "89-880. Right to appropriate — application for
 13 permit. (1) After July 1, 1973, a person may not appropriate
 14 water except as provided in this act. A person may only
 15 appropriate water ~~[for a]~~ for a beneficial use. A right to
 16 appropriate water may not be acquired by any other method,
 17 including by adverse use, adverse possession, prescription
 18 or estoppel; the method prescribed by this act is exclusive.

19 (2) Except as otherwise provided in subsection (5) of
 20 this section, a person may not appropriate water or commence
 21 construction of diversion, impoundment, withdrawal, or
 22 distribution works therefor except by applying for and
 23 receiving a permit from the department. The application
 24 shall be made on a form prescribed by the department. The
 25 department shall make the forms available through its

1 offices and the offices of the county clerks and recorders.
 2 The department shall return a defective application for
 3 correction or completion together with the reasons for
 4 returning it. An application does not lose priority of
 5 filing because of defects, if the application is corrected,
 6 completed and refiled with the department within thirty (30)
 7 days after its return to the applicant, or within a further
 8 time as the department may allow. If an application is not
 9 corrected and completed within 30 days or within a further
 10 time as the department allows, up to 6 months, the priority
 11 date of the application shall be the date of refiling the
 12 application with the corrections with the department. An
 13 application not corrected within 6 months shall be
 14 terminated.

15 (3) The department may cease action upon an
 16 application for a permit and return it to the applicant when
 17 it finds that the application is not in good faith or does
 18 not show a bona fide intent to appropriate water for a
 19 beneficial use. An application returned for any of these
 20 reasons shall be accompanied by a statement of the reasons
 21 for which it was returned, and there shall be no right to a
 22 priority date based upon the filing of the application.
 23 Returning an application pursuant to this subsection shall
 24 be deemed a final decision of the department.

25 (4) A permit issued prior to a final determination of

1 existing rights is provisional and is subject to that final
 2 determination. The amount of the appropriation granted in a
 3 provisional permit shall be reduced or modified where
 4 necessary to protect and guarantee existing rights
 5 determined in the final decree. A person may not obtain any
 6 vested right, to an appropriation obtained under a
 7 provisional permit, by virtue of construction of diversion
 8 works, purchase of equipment to apply water, planting of
 9 crops, or other action, where the permit would have been
 10 denied or modified if the final decree had been available to
 11 the department.

12 (5) Outside the boundaries of a controlled groundwater
 13 area, a permit is not required before appropriating
 14 groundwater by means of a well with a maximum yield of less
 15 than ~~one hundred~~ (100) gallons a minute. Within ~~sixty~~ (60)
 16 days of completion of the well and appropriation of the
 17 groundwater for beneficial use, the appropriator shall file
 18 notice of completion on a form provided by the department at
 19 its offices and at the offices of the county clerks and
 20 recorders. Upon receipt of the notice, the department shall
 21 automatically issue a certificate of water right. The
 22 original of the certificate shall be sent to the county
 23 clerk and recorder, in the county where the point of
 24 diversion or place of use is located, for recordation. The
 25 department shall keep a copy of the certificate in its

1 office in Helena. After recordation, the clerk and recorder
 2 shall send the certificate to the appropriator. The date of
 3 filing of the notice of completion is the date of priority
 4 of the right.

5 (6) A person who desires to convert a nonproductive
 6 oil or gas well to a water well may do so immediately, but
 7 shall file a notice of completion or apply for a permit,
 8 depending on the maximum yield of the well, as otherwise
 9 provided in this act. The date of appropriation shall be
 10 the date of filing the notice of completion or the
 11 application for a permit.

12 (7) A person may also appropriate water, without
 13 applying for or prior to receiving a permit, under rules
 14 adopted by the board under section 89-869 of this act."

15 Section 4. Section 89-884, B.C.M. 1947, is amended to
 16 read as follows:

17 "89-884. Action on application. (1) The department
 18 shall grant, deny, or condition an application for a permit
 19 in whole or in part within one hundred twenty (120) days
 20 after the last date of publication of the notice of
 21 application if no hearing is held, and within one hundred
 22 eighty (180) days if a hearing is held; however, in either
 23 case the time may be extended upon agreement of the
 24 applicant, or, in those cases where an environmental impact
 25 statement must be prepared or in other extraordinary cases,

1 ~~not more than thirty (30) days~~ upon order of the department.
 2 If the department orders the time extended it shall serve a
 3 notice of the extension and the reasons therefor by
 4 certified mail upon the applicant and each person who has
 5 filed an objection as provided by section 89-882.

6 (2) However, an application may not be approved in a
 7 modified form or upon terms, conditions, or limitations
 8 specified by the department, nor denied, unless the
 9 applicant is first granted an opportunity to be heard. If no
 10 objection is filed against the application, but the
 11 department is of the opinion that the application should be
 12 approved in a modified form or upon terms, conditions or
 13 limitations specified by it, or that the application should
 14 be denied, the department shall prepare a statement of its
 15 opinion and the reasons therefor. The department shall serve
 16 a statement of its opinion by certified mail upon the
 17 applicant, together with a notice that the applicant may
 18 obtain a hearing by filing a request therefor within thirty
 19 (30) days after the notice is mailed. The notice shall
 20 further state that the application will be modified in a
 21 specified manner, or denied, unless a hearing is requested."

22 Section 5. Section 89-885, R.C.M. 1947, is amended to
 23 read as follows:

24 "89-885. Criteria for issuance of permit. The
 25 department shall issue a permit if:

1 (1) there are unappropriated waters in the source of
 2 supply;

3 (2) the rights of a prior appropriator will not be
 4 adversely affected;

5 (3) the proposed means of diversion or construction
 6 are adequate;

7 (4) the proposed use of water is a beneficial use;

8 (5) the proposed use will not interfere unreasonably
 9 with other planned uses or developments for which a permit
 10 has been issued or for which water has been reserved;

11 (6) an applicant for an appropriation of 10,000
 12 acre-feet a year or more or fifteen ~~(15)~~ cubic feet per
 13 second or more proves by clear and convincing evidence that
 14 the rights of a prior appropriator will not be adversely
 15 affected."

16 Section 6. Section 89-890, R.C.M. 1947, is amended to
 17 read as follows:

18 "89-890. Reservation of waters. (1) The state or any
 19 political subdivision or agency thereof, or the United
 20 States or any agency thereof, may apply to the board to
 21 reserve waters for existing or future beneficial uses, or to
 22 maintain a minimum flow, level, or quality of water
 23 throughout the year or at such periods or for such length of
 24 time as the board designates.

25 (2) Upon receiving an application, the department

shall proceed in accordance with sections 89-881 through 89-883. After the hearing provided in section 89-883, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records, incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant.

(3) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

(a) the purpose of the reservation;

(b) the need for the reservation;

(c) the amount of water necessary for the purpose of the reservation;

(d) that the reservation is in the public interest. If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(4) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters, or may, with the

approval of the board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation.

(5) A reservation under this section shall date from the date the order reserving the water is adopted by the board, and shall not adversely affect any rights in existence at that time.

(6) The board shall, periodically but ~~not less than at~~ least once every ~~ten~~ ten years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board may extend, revoke or modify the reservation."

Section 7. Section 89-892, R.C.M. 1947, is amended to read as follows:

"89-892. Changes in appropriation rights. (1) An appropriator may not change the place of diversion, place of use, purpose of use or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with section 89-881. If the

department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of section 89-882(2), and hearings shall be held in accordance with section 89-883.

(3) An appropriator of more than fifteen (15) cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval."

Section 8. Section 89-8-100, R.C.M. 1947, is amended

to read as follows:

~~"89-8-100. Hearings--before--board--- Administrative Procedure-Act proceedings. (1)--A-person-who-is-aggrieved-by a--final--decision--of--the--department--under--this--act-is entitled-to-a-hearing-before-the-board--A-person-desiring-a hearing-before-the-board--pursuant--to--this--section--shall notify-the-department-in-writing-within-ten-(10)-days-of-the final-decision"~~

~~(2) The Montana Administrative Procedure Act (Title 82, chapter 42, R.C.M. 1947) governs administrative proceedings conducted under this act, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding."~~

-End-

MINUTES OF THE MEETING
AGRICULTURE, LIVESTOCK & IRRIGATION
MONTANA STATE SENATE

March 11, 1977

The twenty-fourth meeting of the Agriculture, Livestock and Irrigation Committee was called to order on the above date in Room 415 of the State Capitol Building by Chairman Graham at 9:30 a.m.

ROLL CALL: All members were present.

The following witnesses were present to testify:

Representative Day	sponsor
Orrin Ferris	Dept. of Natural Resources
Lawrence Siroky	" " "
Ted Doney	" " "
Representative Dassinger	sponsor

Senator Galt stated that House Bill 344 will be held for the purposes of amendments.

→644
CONSIDERATION OF HOUSE BILL 644: Representative Dassinger handled this bill, since he had been in the House Water Sub-Committee. He pointed out the changes that had been made in the bill. Attached per exhibit #1 are the proposed changes that had been made in the bill.

Ted Doney said this bill is very complicated and felt that some of the changes were only minor. He said one important change would be to add the definition of "diffuse water" to the definition of water. He said they had had some problems with this.

Lawrence Siroky said the BLM built a reservoir and did not get a permit because they said the water was diffuse. This provision would mandate them to get a permit.

It was also brought out that the state water law does not apply to federal lands or Indian Reservations.

The committee decided to hold this bill until some proposed amendments could be worked out.

CONSIDERATION OF HOUSE JOINT RESOLUTION 22: Representative Day said this resolution requested the Department of Natural Resource to do a study on the Powder and Tongue Rivers. This would also include the Indian Reservation in on the study. This is something that both the states of Montana and Wyoming have an interest in.

SENATE

Agriculture COMMITTEE

BILL HJR 80.22

VISITORS' REGISTER

DATE 3-1

[illegible]

#1

EXPLANATION OF H.B. 664
As Amended by the House

Page 2, lines 13 & 14

Adds "diffuse surface water" to the definition of "water". A clarifying amendment. The BLM has refused to obtain water use permits in several cases on the grounds that diffuse surface waters are not covered by the Water Use Act. The DNR&C maintains that such waters are covered, but the only resort left is to sue the BLM. Such a court action will probably take two or three years. This amendment will eliminate the need for a court case.

Page 3, line 24

Corrects the placement of the quotation mark after the word "political".

Page 4, lines 6 & 7

Clarifies the definition of "person" to include "any other entity".

Page 5, lines 2 through 11

Changes the existing law regarding service of copies of the court's preliminary decree when water rights are adjudicated. The amendments will cut down the cost of serving the decree on all water users.

Page 6, line 11

An amendment made by the House Water Subcommittee, at the suggestion of Charles Bowman of MSU. Clarifies the method of expressing the amount of water used for each decreed right by the district court. The DNR&C intends to request the court to express the amount of water in both rate (cfs) and volume (acre-feet per year) anyhow, and already does it for permits.

Page 8, lines 3 through 9

These amendments provide that if an application for a water use permit is not corrected and completed within a period set by the Department, up to 18 months, then the priority date of the application will be changed to the date the corrected application is returned. If it's not corrected within 18 months, the application will be terminated.

Since July 1, 1973 (the effective date of the Water Use Act) the DNR&C has accumulated scores of files of uncorrected applications. The law is un-

Bob Barthelmess said this has been a problem for quite some time. This bill was drafted as a result of a committee study, although it was not introduced by the Department. He felt this bill would be a great advantage to people owning land in two counties.

Mons. Teigen said the association and he as an individual supported the bill.

Robert Deschamps also rose in support in the bill. He felt if this matter could be cleared up it would make the moving of cattle much easier.

Marie McAlear, said many of the grazing associations in her area own land in more than one county and at present this works a hardship on them. Her testimony is attached. See exhibit #1.

Senator Manley as a private land owner with land in two different counties rose in support of the bill. He felt this would rectify a problem that should have been corrected long ago.

Representative Day in closing said that if cattle are out more than 6 months a second permit would have to be obtained.

CONSIDERATION OF HOUSE JOINT RESOLUTION 54: Representative Meloy was the sponsor of this resolution. He said this merely expresses appraisal for the people who put the National High School Rodeo together and shows the legislatures recognition of this rodeo. He felt it was an honor for Montana to have this as it probably won't be having it again for another 20 to 30 years. The impact of this is estimated to bring in 1200 contestants and about 3.2 million dollars to the state.

Tom Winsor said they want to be on record as being in full support of this resolution.

DISPOSITION OF HJR 54: Senator Manley moved the resolution BE CONCURRED IN. Seconded by Senator Kolstad. Motion carried

DISPOSITION OF HOUSE BILL 669: Senator Manley moved that House Bill 669 BE CONCURRED IN. Seconded by Senator Dover. Motion carried.

DISPOSITION OF HOUSE BILL 664: Senator Boylan had some proposed amendments to this bill. See Committee Report. Senator Boylan moved the proposed amendments. Seconded by Senator Dover. Motion carried.

Senator Boylan moved that House Bill 664 BE CONCURRED IN AS AMENDED. Seconded by Senator Dover. Motion carried.

ROLL CALL

AGRICULTURE, LIVESTOCK & IRRIGATION COMMITTEE

45th LEGISLATIVE SESSION - 1976

Date 3-16

NAME	PRESENT	ABSENT	EXCUSED
SENATOR GALT - V. Chairman	✓		
SENATOR ABER	✓		
SENATOR BERGREN	✓		
SENATOR BOYLAN	✓		
SENATOR DOVER	✓		
SENATOR HAGER	✓		
SENATOR JERGESON	✓		
SENATOR KOLSTAD	✓		
SENATOR MANLEY	✓		
SENATOR GRAHAM - CHAIRMAN			✓

STANDING COMMITTEE REPORT

March 16

19 77

MR. PRESIDENT

We, your committee on AGRICULTURE, LIVESTOCK & IRRIGATION

having had under consideration HOUSE Bill No. 664

Respectfully report as follows: That HOUSE Bill No. 664

third reading bill, be amended as follows:

1. Amend title, page 2, line 4.

Following: "WATER"

Insert: ", and providing attorney fees to prior appropriators who object to the issuance of a water use permit whenever the permit application is denied"

2. Amend page 11.

Following: line 17

Insert: "Section 6. There is a new R.C.M. section numbered S9-884.1 that reads as follows:

"S9-884.1. Recovery of attorney fees when application denied.

(1) If an application for a permit is denied, the applicant shall pay the reasonable attorney fees of any prior appropriator who objected to the application and was represented by an attorney at the hearing.

(2) The amount of the fee recoverable under subsection (1) shall be determined by the department after the hearing. The department shall notify both the applicant and the objector of the amount. The award of attorney fees under subsection (1) is a final action of the department and may be appealed to the district court.

Chairman.

Page 2
House Bill 664

March 16, 1977
Agriculture Committee

(3) If an applicant appeals a denial of a permit to the district court and the denial is sustained, the district court may award reasonable attorney fees to any prior appropriator who objected to the application and was represented by an attorney in the court action."

Renumber: all subsequent sections

AND, AS SO AMENDED,
BE CONCURRED IN

SEN. GALT vice-chairman

JUDICIARY

COMMITTEE

45th Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
HB 647	establish a mandatory pre-trial review panel to hear & determine claims for medical liability, to establish rules, etc.	2-2	Scully	Weds 9th	do pass amended	2-24
HB 654	to prohibit placement of youths in need of supervision at detention facilities & to prohibit evaluations, etc	2-2	Meloy	Tues. 8th	do pass as amended	2-15
HB 641	revision of laws relating to the state department of institutions, etc. amending	2-3	Courtney	Wed 9th	do pass as amended	2-11
HB 664	Montana water use act - to clarify definition, etc. appropriation of 10,000 acre feet a year or more must prove, etc.	2-3	Day	Thursday 17th	<u>WATER</u> do pass amended	2-24
HB 672	to permit district judges, when sentencing criminal defendants, to restrict eligibility for parole, etc.	2-3	Colburn	Thurs 10th	sub-committee do pass as amended	2-15
HB 673	alter certain judicial district boundaries & the # of judges in certain districts & to create new districts,	2-3	Colburn	2-10	indefinitely postponed	2-11

and acquiring land. Right now, we cannot use our property rights. This would put us in a position to use water for the use it was intended.

Ted Doney expressed that the DNR has nothing against this bill. He gave an explanation at the request of Nathe as to case water rights. He did say, however, that the priority system would be locked in. Nathe then stated, we are talking about a pretty major change. Doney agreed.

Representative Ramirez then asked Spence, are you willing to have a preference system? Spence answered that all areas of land should be considered and expressed that it should not be a blanket system.

House Bill #436 closed.

Hearing opened on House Bill #664.

WATER SUB COMMITTEE SPONSOR, TED DONEY, DEPARTMENT OF NATURAL RESOURCES. Chairman Day requested Doney to explain this bill.

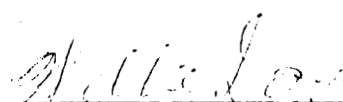
Doney gave hand-outs to committee members specifically pointing out proposed amendments and explained each one. (attached)

He expressed: I think there is a constitutional conflict with the bill the way it now reads.

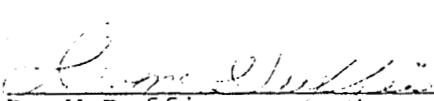
Discussion followed.

Hearing closed on House Bill #664.

Hearing adjourned 10:00 A. M.



Rep. Willie Day, Chairman



D. McDuffie, secretary

WATER SUB COMMITTEE ON JUDICIARY

February 23, 1977

Executive Session

Executive session followed regularly scheduled hearing, 10:15 A. M. February 23, 1977, room 436, Chairman Day presiding. Quorum present. The following action was taken.

House Bill 812. Representative Scully made the motion that this bill be tabled in that it was a duplicate of House Bill 478, sponsored by Curtiss. Motion was made, seconded and passed.
HOUSE BILL 812 TABLED.

House Joint Resolution 81. Representative Scully made the motion that House Joint Resolution do pass. Motion made, seconded and passed.
HOUSE JOINT RESOLUTION 81 DO PASS.

House Joint Resolution 80. Motion made, seconded and passed that House Joint Resolution 80 do pass.
HOUSE JOINT RESOLUTION 80 DO PASS.

House Bill 811. Motion made, seconded and passed that House Bill 811 do pass.
HOUSE BILL 811 DO PASS.

House Bill 814. Scully made the motion do not pass. Ramirez made the motion do pass. There was discussion in regard to this being a premature action. Scully: We have to be awfully careful how we use our water and where. We can't establish a full priority system. Dassinger mentioned the fact of sustaining life and livelihood to be utmost concern. Scully: We can't just keep water and portion it out. Halvorson: We are getting out on too much of a limb, possibly we should just table it for now. Ramirez: I would have to agree with Scully in that we really need to do something that takes into account all aspects, reservations need attention. We need to act now, however, we should amend the bill as to be able to take appropriate steps. Ellison: We need to give the board a little direction. Curtiss made a motion to amend, seconded by Roth, motion failed. Ramirez made the following motion to amend (attached). Motion passed.

Representative Scully made the motion do pass as amended. Seconded. Motion failed.
HOUSE BILL 814 DO NOT PASS.

House Bill 664. Dassinger gave explanation of committee amendments. Doney, DNR, presented additional amendments. Dassinger made the motion that the amendments do pass. Motion passed. The motion was made, seconded and passed for as amended do pass. Curtiss, Bengston and Roth voting no.
HOUSE BILL 664 AS AMENDED DO PASS.

House Bill 538. Representative Nathe explained amendments. Motion was made and seconded to accept amendments. Motion made, seconded and passed that amendments to title be accepted. Motion was made and seconded for as amended do pass. Motion passed.

1 HOUSE BILL NO. 664
2 INTRODUCED BY DAY
3 BY REQUEST OF THE
4 JUDICIARY SUBCOMMITTEE ON MONTANA WATER
5 BY REQUEST OF
6 THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
7
8
9 A BILL FOR AN ACT ENTITLED: "AN ACT TO AMEND SECTIONS
10 89-867, 89-875, ~~89-877~~, 89-880, 89-884, 89-885, 89-890,
11 89-892, ~~AND 89-8-100, AND 89-8-107~~, R.C.M. 1947, OF THE
12 MONTANA WATER USE ACT TO CLARIFY DEFINITIONS; TO REDUCE THE
13 COST OF SERVING COPIES OF PRELIMINARY DECREES; TO CLARIFY
14 THE FINDINGS TO BE MADE BY THE COURT IN THE FINAL DECREE; TO
15 PROVIDE FOR THE PRIORITY DATE OF CERTAIN REFILED
16 APPLICATIONS; TO TERMINATE CERTAIN UNCORRECTED APPLICATIONS;
17 TO CLARIFY THE REFILING OF NOTICES OF COMPLETION OF SMALL
18 WELLS; TO PROVIDE FOR THE EXTENSION OF TIME TO ACT UPON
19 APPLICATIONS IN EXTRAORDINARY CASES; TO PROVIDE THAT AN
20 APPLICANT FOR AN APPROPRIATION OF 10,000 ACRE-FEET A YEAR OR
21 MORE MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE
22 RIGHTS OF A PRIOR APPROPRIATOR WILL NOT BE ADVERSELY
23 AFFECTED; TO CLARIFY THE PERIODIC REVIEW BY THE BOARD OF
24 RESERVATIONS OF WATER; TO PROVIDE THAT THE DEPARTMENT MAY
25 APPROVE CHANGES IN APPROPRIATION RIGHTS WITH CONDITIONS TO

1 PROTECT OTHER APPROPRIATORS; ~~AND TO ELIMINATE THE RIGHT TO~~
2 ~~APPEAL A FINAL DECISION OF THE DEPARTMENT TO THE BOARD; AND~~
3 ~~TO ALLOW THE UNITED STATES TO APPLY FOR RESERVATIONS OF~~
4 ~~WATER, AND PROVIDING ATTORNEY FEES TO PRIOR APPROPRIATORS~~
5 ~~WHO OBJECT TO THE ISSUANCE OF A WATER USE PERMIT WHENEVER~~
6 ~~THE PERMIT WHENEVER THE PERMIT APPLICATION IS DENIED."~~
7

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9 Section 1. Section 89-867, R.C.M. 1947, is amended to
10 read as follows:

11 "89-867. Definitions. Unless the context requires
12 otherwise, in this chapter:

13 (1) "Water" means all water of the state, surface and
14 subsurface, regardless of its character or manner of
15 occurrence, including geothermal water and EXCEPTING diffuse
16 surface water.

17 (2) "Beneficial use" means a use of water for the
18 benefit of the appropriator, other persons, or the public,
19 including, but not limited to, agricultural (including stock
20 water), domestic, fish and wildlife, industrial, irrigation,
21 mining, municipal, power, and recreational uses; provided,
22 however, that a use of water for slurry to export coal from
23 Montana is not a beneficial use. Slurry is a mixture of
24 water and insoluble matter.

25 (3) "Appropriate" means to divert, impound, or

REFERENCE BILL

1 withdraw (including by stock for stock water) a quantity of
2 water, or in the case of a public agency to reserve water in
3 accordance with section 89-890.

4 (4) "Existing right" means a right to the use of water
5 which would be protected under the law as it existed prior
6 to July 1, 1973.

7 (5) "Groundwater" means any water beneath the land
8 surface or beneath the bed of a stream, lake, reservoir, or
9 other body of surface water, and which is not a part of that
10 surface water.

11 (6) "Well" means any artificial opening or excavation
12 in the ground, however made, by which groundwater is sought
13 or through which it flows under natural pressures or is
14 artificially withdrawn.

15 (7) "Permit" means the permit to appropriate issued by
16 the department under sections 89-880 through 89-887.

17 (8) "Certificate" means the certificate of water right
18 issued by the department under sections 89-879, 89-880(5),
19 and 89-888.

20 (9) "Declaration" means the declaration of an existing
21 right filed with the department under section 89-872.

22 (10) "Waste" means the unreasonable loss of water
23 through the design or negligent operation of an
24 appropriation or water distribution facility, or the
25 application of water to anything but a beneficial use.

1 (11) ~~"Political"~~ subdivision "Political subdivision"
2 means any county, incorporated city or town, public
3 corporation or district created pursuant to state law, or
4 other public body of the state empowered to appropriate
5 water, but not a private corporation, association, or group.

6 (12) "Person" means an individual, association,
7 partnership, corporation, state agency, political
8 subdivision, ~~and~~ the United States or any agency thereof, or
9 any other entity.

10 (13) "Department" means the department of natural
11 resources and conservation provided for in Title 82A,
12 chapter 15.

13 (14) "Board" means the board of natural resources and
14 conservation provided for in section 82A-1509.

15 (15) "Act" means the Montana Water Use Act and any
16 subsequent amendments or additions thereto."

17 Section 2. Section 89-875, R.C.M. 1947, is amended to
18 read as follows:

19 "89-875. Preliminary decree. (1) Within a reasonable
20 time after the department files with the district court the
21 material required by section 89-874, the court shall issue a
22 preliminary decree. The preliminary decree shall be based on
23 the data submitted by the department and on any additional
24 data obtained by the court.

25 (2) The preliminary decree shall contain the

1 information, and make the determinations, findings, and
2 conclusions, required for the final decree under section
3 89-877.

4 (3) The district court shall send a copy of the
5 preliminary decree ~~by certified mail with return receipt~~
6 ~~requested to the department, and the department shall serve~~
7 ~~by mail or by personal service a copy of the preliminary~~
8 ~~decree~~ to each person named in the material submitted under
9 section 89-874 or named in the preliminary decree. ~~The~~
10 ~~return receipt shall be appended to the preliminary decree.~~
11 ~~The costs of mailing the copies shall be paid by the~~
12 ~~department. The department shall file proof of service with~~
13 ~~the district court.~~

14 (4) A person named in the material or in the
15 preliminary decree may inspect the data upon which the
16 decree is based at any time, and he may purchase copies of
17 any of the data."

18 SECTION 3. SECTION 89-877, R.C.M. 1947, IS AMENDED TO
19 READ AS FOLLOWS:

20 "89-877. Final decree. (1) The court shall, on the
21 basis of the preliminary decree and on the basis of any
22 hearing that may have been held, enter a final decree
23 affirming or modifying the preliminary decree. If no request
24 for a hearing is filed within the time allowed, the
25 preliminary decree automatically becomes final, and the

1 court shall enter it as the final decree.

2 (2) The final decree shall establish the existing
3 rights and priorities, of the persons named in the petition,
4 for the source or area under consideration.

5 (3) The final decree shall state the findings of fact,
6 along with any conclusions of law, upon which the existing
7 rights and priorities of each person named in the decree are
8 based.

9 (4) For each person who is found to have an existing
10 right, the final decree shall state:

11 (a) the name and post-office address of the owner of
12 the right;

13 (b) the amount of water, rate and volume, included in
14 the right;

15 (c) the date of priority of the right;

16 (d) the purpose for which the water included in the
17 right is used;

18 (e) the place of use and a description of the land to
19 which the right is appurtenant;

20 (f) the source of the water included in the right;

21 (g) the place and means of diversion;

22 (h) the approximate time during which the water is
23 used each year;

24 (i) any other information necessary to fully define
25 the nature and extent of the right.

(5) The final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree."

Section 4. Section 89-880, R.C.M. 1947, is amended to read as follows:

"89-880. Right to appropriate -- application for permit. (1) After July 1, 1973, a person may not appropriate water except as provided in this act. A person may only appropriate water ~~{for-a}~~ for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription or estoppel; the method prescribed by this act is exclusive.

(2) Except as otherwise provided in subsection (5) of this section, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerks and recorders. The department shall return a defective application for correction or completion together with the reasons for

returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed and refiled with the department within thirty (30) days after its return to the applicant, or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 6 18 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 6 18 months shall be terminated.

(3) The department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for any of these reasons shall be accompanied by a statement of the reasons for which it was returned, and there shall be no right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection shall be deemed a final decision of the department.

(4) A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted in a provisional permit shall be reduced or modified where

1 necessary to protect and guarantee existing rights
 2 determined in the final decree. A person may not obtain any
 3 vested right, to an appropriation obtained under a
 4 provisional permit, by virtue of construction of diversion
 5 works, purchase of equipment to apply water, planting of
 6 crops, or other action, where the permit would have been
 7 denied or modified if the final decree had been available to
 8 the department.

9 (5) Outside the boundaries of a controlled groundwater
 10 area, a permit is not required before appropriating
 11 groundwater by means of a well with a maximum yield of less
 12 than one-hundred-~~(100)~~ gallons a minute. Within ~~sixty-(60)~~
 13 days of completion of the well and appropriation of the
 14 groundwater for beneficial use, the appropriator shall file
 15 notice of completion on a form provided by the department at
 16 its offices and at the offices of the county clerks and
 17 recorders. Upon receipt of the notice, the department shall
 18 automatically issue a certificate of water right. The
 19 original of the certificate shall be sent to the county
 20 clerk and recorder, in the county where the point of
 21 diversion or place of use is located, for recordation. The
 22 department shall keep a copy of the certificate in its
 23 office in Helena. After recordation, the clerk and recorder
 24 shall send the certificate to the appropriator. The date of
 25 filing of the notice of completion is the date of priority

1 of the right.

2 (6) A person who desires to convert a nonproductive
 3 oil or gas well to a water well may do so immediately, but
 4 shall file a notice of completion or apply for a permit,
 5 depending on the maximum yield of the well, as otherwise
 6 provided in this act. The date of appropriation shall be
 7 the date of filing the notice of completion or the
 8 application for a permit.

9 (7) A person may also appropriate water, without
 10 applying for or prior to receiving a permit, under rules
 11 adopted by the board under section 89-869 of this act."

12 Section 5. Section 89-884, R.C.M. 1947, is amended to
 13 read as follows:

14 "89-884. Action on application. (1) The department
 15 shall grant, deny, or condition an application for a permit
 16 in whole or in part within one hundred twenty (120) days
 17 after the last date of publication of the notice of
 18 application if no hearing is held, and within one hundred
 19 eighty (180) days if a hearing is held; however, in either
 20 case the time may be extended upon agreement of the
 21 applicant, or, in those cases where an environmental impact
 22 statement must be prepared or in other extraordinary cases,
 23 not--more--than--thirty-(30)--days NOT MORE THAN 60 DAYS upon
 24 order of the department. If the department orders the time
 25 extended it shall serve a notice of the extension and the

reasons therefor by certified mail upon the applicant and each person who has filed an objection as provided by section 89-882.

(2) However, an application may not be approved in a modified form or upon terms, conditions, or limitations specified by the department, nor denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application, but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions or limitations specified by it, or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefor. The department shall serve a statement of its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within thirty (30) days after the notice is mailed. The notice shall further state that the application will be modified in a specified manner, or denied, unless a hearing is requested."

SECTION 6. THERE IS A NEW R.C.M. SECTION NUMBERED 89-884.1 THAT READS AS FOLLOWS:

89-884.1. Recovery of attorney fees when application denied. (1) If an application for a permit is denied, the applicant shall pay the reasonable attorney fees of any prior appropriator who objected to the application and was

represented by an attorney at the hearing.

(2) The amount of the fee recoverable under subsection (1) shall be determined by the department after the hearing. The department shall notify both the applicant and the objector of the amount. The award of attorney fees under subsection (1) is a final action of the department and may be appealed to the district court.

(3) If an applicant appeals a denial of a permit to the district court and the denial is sustained, the district court may award reasonable attorney fees to any prior appropriator who objected to the application and was represented by an attorney in the court action.

Section 7. Section 89-885, R.C.M. 1947, is amended to read as follows:

"89-885. Criteria for issuance of permit. The department shall issue a permit if:

(1) there are unappropriated waters in the source of supply;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit

has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000
~~acre-feet a year or more or fifteen--~~(15) cubic feet per
second or more proves by clear and convincing evidence that
the rights of a prior appropriator will not be adversely
affected."

Section 8. Section 89-890, R.C.M. 1947, is amended to
read as follows:

"89-890. Reservation of waters. (1) The state or any
political subdivision or agency thereof, or the United
States or any agency thereof, may apply to the board to
reserve waters for existing or future beneficial uses, or to
maintain a minimum flow, level, or quality of water
throughout the year or at such periods or for such length of
time as the board designates.

(2) Upon receiving an application, the department
shall proceed in accordance with sections 89-881 through
89-883. After the hearing provided in section 89-883, the
board shall decide whether to reserve the water for the
applicant. The department's costs of giving notice, holding
the hearing, conducting investigations, and making records,
incurred in acting upon the application to reserve water,
except the cost of salaries of the department's personnel,
shall be paid by the applicant.

(3) The board may not adopt an order reserving water

unless the applicant establishes to the satisfaction of the
board:

(a) the purpose of the reservation;

(b) the need for the reservation;

(c) the amount of water necessary for the purpose of
the reservation;

(d) that the reservation is in the public interest. If
the purpose of the reservation requires construction of a
storage or diversion facility, the applicant shall establish
to the satisfaction of the board that there will be progress
toward completion of the facility and accomplishment of the
purpose with reasonable diligence in accordance with an
established plan.

(4) After the adoption of an order reserving waters,
the department may reject an application and refuse a permit
for the appropriation of reserved waters, or may, with the
approval of the board, issue the permit subject to such
terms and conditions it considers necessary for the
protection of the objectives of the reservation.

(5) A reservation under this section shall date from
the date the order reserving the water is adopted by the
board, and shall not adversely affect any rights in
existence at that time.

(6) The board shall, periodically but ~~not less than at~~
least once every ~~ten--~~(10) years, review existing

1 reservations to ensure that the objectives of the
2 reservation are being met. Where the objectives of the
3 reservation are not being met, the board may extend, revoke
4 or modify the reservation."

5 Section 9. Section 89-892, R.C.M. 1947, is amended to
6 read as follows:

7 "89-892. Changes in appropriation rights. (1) An
8 appropriator may not change the place of diversion, place of
9 use, purpose of use or place of storage except as permitted
10 under this section and approved by the department.

11 (2) The department shall approve the proposed change
12 if it determines that the proposed change will not adversely
13 affect the rights of other persons. If the department
14 determines that the proposed change might adversely affect
15 the rights of other persons, notice of the proposed change
16 shall be given in accordance with section 89-881. If the
17 department determines that an objection filed by a person
18 whose rights may be affected states a valid objection to the
19 proposed change, the department shall hold a hearing thereon
20 prior to its approval or denial of the proposed change.
21 Objections shall meet the requirements of section 89-882(2),
22 and hearings shall be held in accordance with section
23 89-883.

24 (3) An appropriator of more than fifteen (15) cubic
25 feet per second may not change the purpose of use of an

1 appropriation right from an agricultural use to an
2 industrial use.

3 (4) The department may approve a change subject to
4 such terms, conditions, restrictions, and limitations it
5 considers necessary to protect the rights of other
6 appropriators, including limitations on the time for
7 completion of the change.

8 (5) If a change is not completed as approved by the
9 department or if the terms, conditions, restrictions, and
10 limitations of the change approval are not complied with,
11 the department may, after notice and opportunity for
12 hearings, require the appropriator to show cause why the
13 change approval should not be modified or revoked. If the
14 appropriator fails to show sufficient cause, the department
15 may modify or revoke the change approval."

16 Section 10. Section 89-8-100, R.C.M. 1947, is amended
17 to read as follows:

18 "89-8-100. Hearings--before--board---- Administrative
19 Procedure Act proceedings. (1)-A person who is aggrieved by
20 a--final--decision--of--the--department--under--this--act--is
21 entitled to a hearing before the board. A person desiring a
22 hearing before the board pursuant to this section shall
23 notify the department in writing within ten (10) days of the
24 final decision.

25 (2) The Montana Administrative Procedure Act (Title

82, chapter 42, R.C.M. 1947) governs administrative proceedings conducted under this act, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding."

SECTION 11. SECTION 89-8-107, R.C.M. 1947, IS AMENDED TO READ AS FOLLOWS:

"89-8-107. Reservations. The department may apply for reservations and shall, as rapidly as possible, assist other appropriate state agencies and political subdivisions in applying for reservations within the basin. ~~The United States or any agency thereof may not apply for a reservation of water in the basin under section 89-890, R.C.M. 1947, until the requirements of section 3 [89-8-105] of this act are met.~~ THE UNITED STATES OR ANY AGENCY THEREOF MAY APPLY FOR RESERVATION OF WATER IN THE BASIN UNDER SECTION 89-890, R.C.M. 1947, FOR BENEFICIAL USE OF THAT WATER IN THE STATE OF MONTANA. Particular emphasis shall be given to applications to reserve water for agricultural, municipal, and minimum flow purposes for the protection of existing rights and aquatic life."

-End-